FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 2084

DOWN TOWN ASSOCIATION OF THE CITY OF NEW YORK,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Down Town Association of the City of New York respectfully prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on May 2, 1960.

Opinions Below

The opinion of the United States District Court for the Southern District of New York (103a-105a)* is reported at 4 AFTR 2d 6133 and 59-2 U. S. T. C. ¶ 15,240; it is not officially reported. The opinion of the United States Court of Appeals for the Second Circuit (R. 45b-55b),* printed as Appendix I to this

* The reference R indicates the paging of the certified record. References to the appendix to the brief of Appellant below are indicated by numerals followed by the letter *a*, and to that of Appellee by the letter *b*. For the convenience of the Court references to the findings of the District Court have been designated in addition by the letter F, followed by the finding number, and the stipulation of facts by the abbreviation "Stip.", with a paragraph number.

petition, is reported at F. 2d , 5 AFTR 2d ¶ 195,926, and CCH Fed. Excise Tax Rep. ¶ 15,296.

Jurisdiction

The judgment of the Court of Appeals was entered May 2, 1960 (R. 56b). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1).

Questions Presented

(1) Whether the Federal Statute taxing dues of a "social club" was improperly construed to apply to a businessman's luncheon club serving no other function of entertainment.

(2) Whether the function of a club in serving luncheons is of itself enough to make the club a social club, and, even if so, whether the individual business motives of members of petitioner are not sufficient to bring it within an exception recognized by the Treasury Regulations for a club whose social features are subordinate and merely incidental to a different predominant purpose, namely, business.

Statute and Regulations Involved

The applicable statute is as follows: Internal Revenue Code [1939]:

"SEC. 1710 [as amended by Sec. 543(a) of the Revenue Act of 1941, c. 412, 55 Stat. 711].* TAX.

"(a) RATE.—There shall be levied, assessed, collected, and paid—

*The rate of tax was increased to 20% by § 302(a) Revenue Act of 1943 (58 Stat. 61) by amendment of § 1650, Internal Revenue Code.

"(1) DUES OR MEMBERSHIP FEES.—A tax equivalent to 11 per centum of any amount paid as dues or membership fees to any social, athletic, or sporting club or organization, if the dues or fees of an active resident annual member are in excess of $10 per year."

Regulations of the Treasury Department in effect during the years in question, and still in effect, provide:

"Treasury Regulations 43 (1941 ed.):

"SEC. 101.24. DETERMINATION OF CHARACTER OF CLUB.—The purposes and activities of a club or organization *and not its name* determine its character for the purpose of the tax. Every club or organization having social, athletic, or sporting features is presumed to be included within the meaning of the phrase, 'any social, athletic, or sporting club or organization,' until the contrary has been proved, and the burden of proof is upon it. Every such club or organization, therefore, unless it falls within the express exemption of the Code (see section 101.30), must collect, return, and pay over the tax imposed by the Code, unless and until it has satisfied the Commissioner of Internal Revenue that it is not in fact 'social, athletic, or sporting' within the meaning of the Code and as defined in these regulations. If any such club or organization claims that it is not in fact 'social, athletic, or sporting,' it shall submit to the collector a copy of its charter or constitution and by-laws, together with a statement showing its actual purposes, activities, practices, and facilities, the character of its expenditures, and such other evidence as may be requested. Upon consideration of the evidence submitted, the collector will determine, if he can do so, whether or not such club or organization comes within the provisions of the Code. If, however, the collector is in doubt as to

whether or not the club or organization is 'social, athletic, or sporting,' he will refer the statement and accompanying papers to the Commissioner for decision. When a club or organization has been held not to be a 'social, athletic, or sporting' club or organization it need not thereafter make a return or any further showing with respect to its status under the law, unless it changes the character of its organization or operations or the purpose for which it was originally created. Collectors will keep a list of all clubs and organizations held not to be 'social, athletic, or sporting' clubs or organizations, to the end that they may occasionally inquire into their status and ascertain whether the conditions upon which their exemption was predicated remain unchanged. If the collector decides that the club or organization comes within the provisions of the Code and the club or organization is not satisfied with his decision, it may request that the matter be referred to the Commissioner for a ruling."

"SEC. 101.25. SOCIAL CLUBS.—Any organization which maintains quarters or arranges periodical dinners or meetings, for the purpose of affording its members an opportunity of congregating for social intercourse, is a 'social * * * club or organization' within the meaning of the Code, unless its social features are not a material purpose of the organization but are subordinate and merely incidental to the active furtherance of a different and predominant purpose, such as, for example, religion, the arts, or business. The tax does not attach to dues or fees of a religious organization, chamber of commerce, commercial club, trade organization, or the like, merely because it has incidental social features, but if the social features are a material purpose of the organization it is a 'social * * * club or organization' within the meaning of the Code. An organization

that has for its exclusive or predominant purpose religion or philanthropic social service (or the advancement of the business or commercial interests of a city or community) is clearly not a 'social * * * club or organization.' Most fraternal organizations are in effect social clubs, but if they are operating under the lodge system, or are local fraternal organizations among the students of a college or university, payments to them are expressly exempt (see section 101.30).

"Examples.—(1) Neither a Young Men's Christian Association nor a Young Men's Hebrew Association is a social club within the meaning of the Code, for the predominant purposes of each are religion and philanthropic social service.

"(2) A social settlement which provides, among other things, dances and other social opportunities for a slum neighborhood is supported by contributions. Any person contributing $30 a year is called a 'member' of the settlement association. Such contributions are not taxable, for such a settlement is not a social club within the meaning of the Code, as its predominant purpose is philanthropic social service.

"(3) An automobile dealers' association is organized and operated for the purpose of maintaining a social organization of persons residing in a certain city and engaged in the manufacture or sale of automobiles and accessories, affording its members opportunity to enjoy healthful games, and of promoting social welfare and social intercourse between the members and, by debates and discussions among themselves at their meetings, promoting interest in automobile transportation, traffic, and knowledge of the industry in this city. This organization is a social club within the meaning of the Code."

Statement

Plaintiff's claim is on behalf of its members for recovery of excise taxes collected for the period August, 1942 - March, 1947. The jurisdiction of the District Court was invoked under 28 U. S. C. §§ 1340 and 1346(a)(1).* The tax involved is that under § 1710(a)(1) of the Internal Revenue Code [1939], as amended, on dues paid "any social, athletic, or sporting club or organization". (The corresponding provision of the 1954 Code is 26 U. S. C. § 4241.)

The plaintiff organization is a business man's luncheon club. The facts were in large part stipulated, with the stipulation supplemented by the uncontradicted testimony of some thirteen member witnesses.

It is not disputed that for the past forty years plaintiff's activities have been restricted almost exclusively to serving luncheon on working days (Stip. ¶ 1, 7a; F2, 103a; App. I, p. 18, R. 46b).† Some business or philanthropic organizations occasionally use its facilities for afternoon meetings (32a-33a).

The testimony of the members (both those called by the plaintiff and those subpoenaed by the Government) was that their use of this luncheon club was predominantly if not exclusively for their business purposes (26a, 31a, 61a, 70a, 73a, 77a, 79a, 90a, 94a, 96a-97a, 102a).

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* The action is to recover, as erroneously and illegally collected, internal revenue taxes in an amount in excess of $10,000. The collector was dead when the action was commenced (2a, 5a).

† The court below emphasized this fact as against variant declarations of the hundred-year-old charter. See App. I, pp. 18, 22-23, R. 46b, R. 50b. Cf. also the findings of the District Court, 103a-105a.

The club is located near the center of New York's financial district (Stip. ¶ 8, 11a; F1, 103a)* where a large percentage of the members have their offices (39a). The membership is composed chiefly of lawyers, insurance men, bankers, brokers, or business executives (F3, 103a; Stip. ¶ 17, 18, 15a-16a; cf. App. I, p. 19, R. 47b).

Members bring there for luncheon clients, business associates, or prospects (F4, 104a; also 26a, 31a, 57a-58a, 61a, 70a, 73a). Testimony abounded confirming the predominantly business character of conversations and discussions at the Association (22a, 31a-32a, 40a, 57a-58a, 61a, 65a, 70a, 79a, 90a, 92a-93a, 94a, 97a; cf. F4, 104a), though of course there is no compulsion in this respect (F4, 104a). Of the meals served in the general dining rooms roughly one-third were served to non-members (F4, 104a; 35a).

Members are permitted to bring members of their families if accompanied by a member, but rarely do so; families of members have no privileges (F4, 104a; Stip. ¶ 13, 13a; 32a). With a very rare exception for a wife or daughter, women brought to the club were clients or otherwise connected with business (40a, 58a, 62a, 64a, 68a, 81a, 90a, 94a, 97a, 99a).

The service of liquor plays a minor part in the use of the association's facilities since during the years in question the receipts from liquor sales amounted to

* The Association owns its own quarters bought some 70 years ago—a comfortable five-story building at 60-62 Pine Street (Stip. ¶ 1, 7a; F1, 103a; App. I, p. 19, R. 46b). The stipulation describes the building in some detail—it comprises a number of dining rooms and appurtenant facilities (including a room referred to as the "library" where after-lunch coffee is served and magazines are available, a smoking room, and a small bar for clams and cheese as well as liquor) but no sleeping or athletic facilities (Stip. ¶s 1, 8-10, 14, 7a, 11a-12a; F4a; see also F1, 103a; App. I, p. 19, R. 46b-47b).

only about 8% of the returns from food sales (Stip. ¶ 14, 13a-14a; cf. F1, 103a; App. I, p. 19, R. 47b). The Association has never sponsored a party, dance or similar function; there are no facilities for games of any kind, or recreational or athletic exercise, or even a radio or television set (F2, 103a; App. I, p. 20, R. 47b); there are no exchange privileges with other clubs (F1, 103a; 52a).

As stated by the Court below:* "Membership is by application, election and payment of an entrance fee of $300 and yearly dues. The sole restriction on availability of memberships is a limitation as to the number who might join * * *." (App. I, p. 19, R. 47b.)*

Entrance fees and dues of some members were paid by their firms as a business expense (F5, 104a)—nearly half the checks received during the period of a count in the year of the trial were firm checks (37a-39a).

In 1929 the Commissioner of Internal Revenue held that the plaintiff was not a social club within the meaning of the statute and refunds were made of taxes for previous years; thereafter no payments were required until 1942. In that year the Internal Revenue Service, changing position, notified plaintiff that taxes should be collected (Stip. ¶s 2-3, 7a-8a; 18a; 21b-24b). Suit was brought for taxes then paid for part of 1942, but in 1947 the Government assented to an administrative refund and that action was dismissed with prejudice (Stip. ¶s 5-6, 10a). In 1948, however, the Commissioner (changing position for the third time) rejected

* Election is by the Board of Trustees and Managers after the prospective member has been proposed and seconded by two members and his name posted. He must be known by two Board members (F3, 103a).

timely claims for refund of taxes paid for the latter part of 1942 to the Spring of 1947 (Stip. ¶ 7, 10a-11a): it is to recover these latter payments that the present action was instituted.

The Court below, despite full acceptance of the view that plaintiff's activities are restricted almost exclusively to serving lunch on working days, and that "the social features of the club beyond the weekday congregation for lunch are minimal" (App. I, p. 18, 23, R. 46b, R. 50b), affirmed the decision holding the organization taxable. The Court stated the question before it as "whether a businessman's luncheon club, serving no other function of entertainment, is by definition a social club". (App. I, p. 22, R. 49b). This question it answered affirmatively.

The Court's essential view appears in its conclusion: "The congregation of people together into an association creates a social club unless their aggregation is shown to be for a definite mass purpose other than the desire of human beings to seek companionship". (App. I, p. 27, R. 54b). The court additionally rejected the view that individual business motivations of members were sufficient to constitute such a different mass purpose (see App. I, p. 27, R. 54b-55b).

Reasons for Granting the Writ

1. The decision below is only the latest of a series of court decisions exemplifying wide variation in judicial approach and in the understanding of what is meant by "social club" in the statute in question. The statute does not define the term, and the definition in

the Treasury Regulations is still in terms of the word "social". In this case, as in others, Internal Revenue has reflected these differences in view by shifting its own position even as to a single club.

The number of cases* and the variations in result, particularly as regards the business lunch clubs (see cases cited below) point to the need for an authoritative determination by this Court to reduce the burdens of needless litigation on courts and on litigants, private and governmental. This Court has not previously passed on the question here presented. It is urged that the time is now ripe to do so.

Even a brief review discloses the confusions.

In a number of cases, business men's luncheon clubs were held not to be social clubs within the section. E.g. *Aldine Club* v. *United States*, 65 Ct. Cl. 315 (1928); *Whitehall Lunch Club* v. *United States*, 9 F. Supp. 132 (Ct. Cl. 1934); *Century Club* v. *United States*, 12 F. Supp. 617 (Ct. Cl. 1935). As was pointed out in *Rockefeller Center Luncheon Club* v. *Johnson*, 131 F. Supp. 703 at 709 (S. D. N. Y. 1955), "Until 1942 the cases almost consistently held that true business luncheon clubs were not social clubs." In 1934, the Second Circuit itself had held non-taxable the Columbia University Men's Faculty Club (though that is more than a lunch club): *Tidwell* v. *Anderson*, 72 F. 2d 684.

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* Some sixty-odd cases are listed in P H Federal Taxes (Excise) ¶s 189, 354 and 189, 355 as passing on whether clubs are social clubs. The amounts involved in such litigation vary but may be substantial. For example, the present action is to recover $129,090.87 plus interest, but a companion suit will by stipulation be governed by the result here. The government estimated in the Court below that the amount of tax refund dependent on the appeal was then approximately $700,000 including interest.

In 1942, however, the Third Circuit held taxable the Duquesne Club of Pittsburgh (a luncheon club which, however, had a number of features that were clearly social). Although the result could therefore seemingly have been reached without adopting such a view, the Court in the course of the opinion said that:

> "We are prepared to say that an organization, whether incorporated or not, which provides an opportunity for its members to meet each other at mealtimes and partake together of food and drink with conversation on whatever subject pleases them is a social organization."

Duquesne Club v. *Bell*, 127 F. 2d 363, 366 (3d Cir. 1942), *cert. denied*, 317 U. S. 638.

The Court of Claims firmly rejected this view of the Third Circuit, held the Merchants Club of New York non-taxable, and said:

> "It is true that in the opinion in the case of Duquesne v. Bell, 3 Cir., 127 F. 2d 363, the court uses language to the effect that any club where food and drink are served, with conversation on whatever subject pleases the members, is a social organization within the meaning of the statute. But the language was manifestly dictum since the social features of that club were so numerous as to make it clearly taxable. In fact this court has held the same club subject to the tax.
>
> * * * * *
>
> "Food is essential to life. It is not confined to a club. Eating, therefore, can scarcely be classed as a social activity since it is universal and necessary. The discussion of business while at lunch, both in and out of clubs, is a common practice in America. It is almost a habit.
>
> * * * * *

> "The predominant purposes of the club are to furnish to its members convenient luncheon facilities on business days, as well as a place where they can hold business meetings and conferences, the social features being incidental to these predominant purposes."

Merchants Club v. *United States*, 66 F. Supp. 126, 128, 129 (Ct. Cl. 1946).

The First Circuit in 1948, in *Turks Head Club* v. *Broderick*, 166 F. 2d 877, appeared to follow the views of the Third as to the characterization of eating—though again there was at least one clearly social feature which could otherwise justify the result (see pp. 879, 880) and moreover the court expressly grounded its decision on the failure of plaintiff there to file the necessary powers of attorney to represent the members (see p. 881).

In 1949, the Court of Claims reiterated that it had not departed from its view that "eating as such is not a social activity." *Uptown Club of Manhattan, Inc.* v. *United States*, 83 F. Supp. 823, *cert. denied* 338 U. S. 823 (1949).

Subsequently the Court of Claims held some clubs taxable, though it did so on the basis of added social features, never on the view that a luncheon club was *per se* taxable, or that eating lunch was *per se* social. *Bankers Club of America* v. *United States*, 87 F. Supp. 253 (1949), *Drug and Chemical Club of New York* v. *United States*, 115 Ct. Cl. 66 (1949), *cert. denied* 340 U. S. 810, *Railroad Machinery Club of New York* v. *United States*, 95 F. Supp. 822 (1951), *Arkwright Club of the City of New York* v. *United States*, 117 F. Supp. 411 (1954) and *Lucidge* v. *United States*, 159 F. Supp. 376 (1958).

In *Rockefeller Center Luncheon Club* v. *Johnson*, *supra*, the District Court for the Southern District of New York held that club non-taxable. It adopted the view that a business men's lunch club was not a social club, and treated as immaterial the fact that the members' business purposes were separate rather than joint. See 131 F. Supp. at 711.

The Court below, apparently disapproving the Rockefeller Luncheon Club case, not only appeared to acquiesce in the view (twice expressly rejected by the Court of Claims) that eating is in itself social, but went further to find that any "congregation of people together into an association" created a social club unless it was shown that there was a "definite mass purpose" other than a desire to seek human companionship. The Court did not specify what kind of mass purpose would suffice, but it indicated that individual members' business purposes did not satisfy the requirement:

The Court rejected the view of the Court of Claims that the Third Circuit's classification of eating as social was dictum (App. I, p. 24, R. 51b); made no attempt to reconcile its own decision with the holdings of the *Aldine Club*, *Whitehall Lunch Club* and *Century Club* cases; and disregarded as unimportant the distinctions offered to reconcile Court of Claims' decisions by that Court itself (App. I, p. 26, R. 53b).

The decision below thus completes the confusion. Neither by their results nor by the reasoning of the opinions can all the different cases now be reconciled.

The present case offers a clear-cut basis for resolving the conflicts implicit and explicit in former decisions, for here, as both decisions below emphasize, (a) there are no extraneous social features, and the issue

is squarely presented whether a businessman's luncheon club, without more, is a social club, and (b) also presented squarely is the question whether separate business motivations of members, as distinct from a corporate activity, will suffice to show a non-social purpose. Accordingly a decision by this Court in this case could eliminate confusion and produce a uniformity in approach and result greatly to be desired in the interest both of simplicity and fairness in application of the statute.

2. The decision below is in clear conflict with early decisions of the Court of Claims above mentioned (*Aldine Club* v. *United States*, 65 Ct. Cl. 315 (1928); *Whitehall Lunch Club* v. *United States*, 9 F. Supp. 132 (Ct. Cl. 1934); and *Century Club* v. *United States*, 12 F. Supp. 617 (Ct. Cl. 1935)),* and runs counter as well to the views unequivocally expressed by the same Court in *Merchants Club* v. *United States*, 66 F. Supp. 126 (Ct. Cl. 1946) and stated to be adhered to in *Uptown Club of Manhattan, Inc.* v. *United States*, 83 F. Supp. 823, 830 (Ct. Cl. 1949), *cert. denied* 338 U. S. 823.

It is urged that the extreme position of the Second Circuit in this case, giving the most inclusive scope to the tax, not only conflicts with the Court of Claims but is erroneous. Were the statute to be so far expanded beyond what early decisions indicate, that task, we submit, was for Congress.

The Court below minimized its own conflict with the Court of Claims by pointing to some of the cases

* The Government's brief below in effect conceded this, saying as to these cases that "the Government makes no claim that they are distinguishable" (p. 22). However the Government contended that later decisions of the Court of Claims indicated a different view. This latter contention is discussed below.

cited above, p. 12, wherein various clubs were held to be social clubs. However, as the opinions in those cases emphasize, in all there were significant social features* (features which are notably absent in the present instance). Emphasis on such factors undermines any conclusion that the Court of Claims intended to discard its conclusion that eating "can scarcely be classed as a social activity" (66 F. Supp. at 129).

Moreover not only has the Court of Claims remained silent as to any intention to overrule the *Merchants Club* case, but it has been similarly silent as to the *Aldine Club*, *Whitehall Lunch Club* and *Century Club* cases.

3. It is urged that the decision below not only departed from early decisions under the statute, but that it exceeds limits suggested by the language employed by Congress, and accordingly should be reviewed by this Court.

As the Second Circuit itself once pointed out:

> "It should be noticed that this statute does not tax clubs generally. Only social, sporting and athletic clubs are taxed."

Tidwell v. Anderson, 72 F. 2d 684, 687 (2d Cir. 1934).

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* Social features that were emphasized were percentage of liquor consumed (in the *Bankers Club* case, for example, between ¼ and ⅓ of the amount for food), and especially club privileges for women relatives of members—including usually the privilege not only of attending the club unaccompanied but of themselves entertaining guests. Cf. the *Rockefeller Center Luncheon Club* case, supra, 131 F. Supp. at 711. Other social features were present in some instances.

The Court below also pointed to the citation of the *Turks Head* case in the *Arkwright* opinion as suggesting a change in the Court of Claims' views. However, the *Turks Head* case was cited in the *Arkwright* opinion merely among a large group referred to as "not out of harmony"; and in view of the fact that in *Turks Head*, as in *Arkwright*, there were the above privileges for women relatives, the citation appears not to be significant. See 117 F. Supp. at 412.

In view of the breadth of tax application under the Second Circuit's present view, it is worth noting that not only did Congress not provide for taxation of all clubs, it did not even provide for taxation of all clubs except those formed for charitable purposes (the word "charitable" being used here in the sense in which it is used in sustaining trusts for such purposes). The grouping of "social, athletic or sporting" in the statute points to a purpose to tax the dues of the purely recreational organizations. Under that view, the statutory terms should not be held to include an organization like petitioner, which serves as an adjunct of the business lives of its members and an aid in fulfilling their business purposes, not for mere recreation.

Conclusion

It is respectfully submitted that this petition for a writ of certiorari should be granted.

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REBECCA M. CUTLER
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June, 1960

APPENDIX I

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 191—October Term, 1959.

(Argued March 10, 1960 Decided May 2, 1960.)

Docket No. 25903

DOWN TOWN ASSOCIATION OF THE CITY OF NEW YORK,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee.

Before:

CLARK, WATERMAN AND LEWIS,*
Circuit Judges.

On Appeal From United States District Court for the Southern District of New York

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TIMOTHY N. PFEIFFER (Milbank, Tweed, Hope & Hadley and Rebecca M. Cutler, of Counsel, on the brief), *for Plaintiff-Appellant.*

JOSEPH M. FIELD, Assistant United States attorney (S. Hazard Gillespie, Jr., United States Attorney for the Southern District of New York, on the brief), *for Defendant-Appellee.*

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* Of the Tenth Circuit, sitting by designation.

LEWIS, *Circuit Judge:*

Appellant brought suit on behalf of its members to recover taxes collected by appellant from its members and remitted to the Collector of Internal Revenue for the period between August 1942 and March 1947, in compliance with the directive of Section 1710(a)(1) of the Internal Revenue Code of 1939.[1] The trial court ruled that the social aspects of the service maintained by the appellant make it a social club within the terms of that section and dismissed the complaint with costs. Appellant challenges that finding.

The major facts were stipulated: The Down Town Association of the City of New York is a New York corporation, incorporated in 1860 for the purpose of furnishing "to persons engaged in commercial and professional pursuits in the City of New York, facilities for social intercourse, and such accommodations as are required during the intervals of business while at a distance from their residences, also the advancement of literature and art, by establishing and maintaining a library, reading-room and gallery of art, or by such other means as shall be expedient and proper for such purpose." However, despite the stated objects at the time of organization, it is agreed that the literary and artistic aspects of the club have not been promoted and that the activities of appellant for the past forty years have been restricted almost exclusively to serving luncheon on working days from 12:00 noon until 2:30 p. m.

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[1] 1710(a) There shall be levied, assessed, collected, and paid—

(1) A tax equivalent to 11 per centum of any amount paid as dues or membership fees to any social, athletic, or sporting club or organization, if the dues or fees of an active resident annual member are in excess of $10 per year.

The appellant owns the clubhouse at 60-62 Pine Street, which is a five story building. The first floor contains a lobby, a smoking room, and a small bar at which cocktails and hors d'oeuvres are served; the second floor, two large dining rooms and a library where members and guests are served coffee and read an assortment of magazines and daily newspapers; the third floor, three dining rooms; and the fourth floor one large dining room and six private rooms. The fifth floor houses the utility rooms necessary to the clubhouse's operation. The bar is open during the hours the clubhouse is open, 8:00 a. m. until 4:00 p. m. except Sundays and holidays but is rarely used except during the early part of the luncheon hours. Liquor sales were approximately eight per cent of food sales during the period under examination.

Membership in the organization is obtained by application, election, and payment of an entrance fee of $300 and yearly dues. The sole restriction on availability of memberships is a limitation as to the number who might join, and the occupations of the members, although predominantly lawyers, cover numerous fields.

A candidate for membership is passed upon by the governing board of fifteen "Trustees and Managers" by ballot, and this board also controls the internal affairs of the Association.

There is no Association rule prohibiting members from bringing their wives or others to the house of the Association, but members rarely do so, and members with lady guests are limited to the use of the dining room on the third floor or the private dining rooms. Wives, other family members or lady guests are not permitted except in the company of the member.

The Association has never sponsored a party, dance or similar function; there are no facilities for games such as cards or billiards, nor, in fact, a radio or television set.

For several years prior to 1929, appellant paid taxes on its members' dues under statutes preceding Section 1710 taxing dues of social, sporting and athletic clubs, which payments were returned in full in 1929 by The Commissioner of Internal Revenue. Thereafter and until August 21, 1942, no taxes were required from appellant, but on that date appellant was notified that it must collect and remit taxes on membership dues thereafter. Between August 1942 and March 1947, taxes were paid in the amount of $129,090.87; claim for refund of this amount was rejected by the Commissioner of Internal Revenue; and this suit followed.

The trial court after reviewing the stipulated facts and testimony which showed that many members used the club in connection with their various businesses, stated:

> "This Court has little doubt that the time of many of the members spent in the clubhouse is at least partly devoted to discussions of their business. Indeed we are ready to find that some busy lawyers and business executives find the ordinary business day too brief for their work and that their luncheon hour is at times necessarily devoted to such of their work as consists of discussions that can be had away from their desks. Such discussions serve the member's purpose. While the club of course makes no effort to procure company for a member, its only reason for being is to afford those members a facility for enjoying lunch in convenient and pleasant surroundings and with company attractive to them. We call such a pur-

pose altogether social. Plaintiff has no 'different or predominant' purpose required by the regulation."

The regulation to which reference is made is U. S. Treasury Regulation 43, §§ 101.24-.25, 26 C. F. R. §§ 101.24-.25:

"101.24. *Determination of character of club.* The purposes and activities of a club or organization and not its name determine its character for the purpose of the tax. Every club or organization having social, athletic, or sporting features is presumed to be included within the meaning of the phrase, 'any social, athletic, or sporting club or organization,' until the contrary has been proved, and the burden of proof is upon it. * * * "

"101.25. *Social clubs.* Any organization which maintains quarters or arranges periodical dinners or meetings, for the purpose of affording its members an opportunity of congregating for social intercourse, is a 'social * * * club or organization' within the meaning of the Code, unless its social features are not a material purpose of the organization but are subordinate and merely incidental to the active furtherance of a different and predominant purpose, such as, for example, religion, the arts, or business. The tax does not attach to dues or fees of a religious organization, chamber of commerce, commercial club, trade organization, or the like, merely because it has incidental social features, but if the social features are a material purpose of the organization it is a 'social * * * club or organization' within the meaning of the Code. An organization that has for its exclusive or predominant purpose religion or philanthropic social service (or the advancement of the business or commercial interests of a city or community) is clearly not a 'social * * * club or organization.' * * *"

Although the cases interpreting the statute and regulation are many, see 143 A. L. R. 1281; 80 A. L. R. 1296, most of them seek to resolve the question of whether a club originally organized for a philanthropic or business purpose depends upon its social activities for its existence. The question here is considerably narrowed by the stipulation and as presented becomes whether a businessman's luncheon club, serving no other function of entertainment, is by definition a social club.

The recitation in the articles of incorporation that one of the purposes of the corporation is to furnish opportunity for social intercourse is not conclusive of the determination, *Century Club* v. *United States*, Ct. Cl., 12 F. Supp. 617; *Union Club* v. *Heiner*, 3 Cir., 99 F. 2d 259, for indeed it is recognized that any organization, regardless of its compelling purpose for existence, provides the means of social intercourse, *United States* v. *McIntyre*, 4 Cir., 253 F. 2d 729. In *Tidwell* v. *Anderson*, 2 Cir., 72 F. 2d 684, it is stated:

> "The test of taxability is not whether a club has any social features at all, but whether or not such activities; viewed, of course, in the light of all the circumstances of its existence including the declared purpose of the organization as shown by its constitution and by-laws, if their provisions are enforced, are what in fact provide the real reason for its existence and enable it to secure members and retain them. Another way to put the problem is 'whether the social features of the club involved are merely incidental or whether, on the other hand, they are a material purpose of the organization.' Union League Club of Chicago v. United States, supra [Ct. Cl., 4 F. Supp. 929.]"

In the present case, the stated artistic purposes of the club have been abandoned and the social features of the club beyond the week-day congregation for lunch are minimal. Many cases wherein a luncheon club has been held taxable rest on the basis of additional social features, and each case and each club is individualized by the particular arrangement made by the members for the benefits they seek. See *Rockefeller Center Luncheon Club* v. *Johnson*, S. D. N. Y., 131 F. Supp. 703; cf. *Downtown Club of Dallas* v. *United States*, 5 Cir., 240 F. 2d 159; *Century Ass'n* v. *Anderson*, 10 F. Supp. 1005 (S. D. N. Y. 1935). We consider, therefore, only those cases which have spoken to the precise point of whether a businessmen's luncheon club is necessarily a social club.

The Third Circuit in *Duquesne Club* v. *Bell*, 127 F. 2d 363, has held such a club to be social in nature, Judge Goodrich stating:

> "We are prepared to say that an organization, whether incorporated or not, which provides an opportunity for its members to meet each other at mealtimes and partake together of food and drink with conversation on whatever subject pleases them is a social organization. This assumes, of course, an organization the main purpose of which, as is true here, is not other than to provide such an opportunity. Elaborately comfortable quarters may add to the enjoyment of the occasion but do not change its nature. If the members play games together, invite outside guests, either men or women, or add any of the countless things with which people amuse themselves, again the social program becomes more elaborate, but it no more is a social program than that of the luncheon [illegible] dozen men about a table without the additional features * * *."

Appellant asserts that the facts of the *Duquesne Club* case would support a holding of taxability without the above statement which it considers gratuitous dicta. *Rockefeller Center Luncheon Club* v. *Johnson*, *supra*; *Merchants Club* v. *United States*, Ct. Cl., 66 F. Supp. 126, but the reiterations of this distinction do not make it so and the limitation on the activities of the Duquesne Club are clearly set forth in the opinion and are similar to those here before us. Additionally, the Third Circuit expressly overruled *Union Club of Pittsburgh* v. *Heiner*, *supra*, holding that a business luncheon club was not taxable, even though it had incidental social features beyond luncheon. The members of the *Duquesne Club* were engaged in diversified businesses, as here, and testified that they used the club luncheons for their individual business purposes, as here. Of this contention, the Third Circuit Court queried, p. 366:

> "* * * Does the fact that some or many of the members use the club, especially at noon, to talk with others the problems of their own particular business as well as eat their lunch make the club a business and not a social club?
>
> "We think it does not, and for two reasons. One is that conversations around dining tables of the individual members upon whatever subject they choose to talk about while they eat has nothing to do with club activity at all. All the club is doing is to provide excellent and enjoyable facilities for these meetings to take place. The second reason is that even if the sole test were whether the activities which were going on in the club were more than incidentally social, there is no proof, and no way of proving, that of the $228,000 worth of food dispensed and the $89,000 worth of beverages con-

sumed in one year, only an incidental portion was over social as distinguished from business enterprises."

Appellant urges that the First Circuit's decision in *Turk's Head Club* v. *Broderick*, 166 F. 2d 877, should not be considered because that court dismissed for procedural defects and then discussed the merits, overruling its prior case of *Page* v. *Squantum Ass'n*, 1 Cir., 77 F. 2d 918. Since the procedural defect was immediately remedial, the court's disposition of the case on the merits was effective to prevent further litigation by endorsing the reasoning of the *Duquesne Club* case:

> "* * * The argument is that eating 'can scarcely be classed as a social activity since it is universal and necessary.'
>
> "But if one invites friends to dinner, the occasion is a social one, in common parlance, whether the guests are moved to acceptance by contemplation of the fine meal they will have or of the pleasant company wherewith to beguile away the time. And so, it seems to us, when a group of men get together to form a club for the major purpose of furnishing private quarters of attractive outlook where carefully screened congenial spirits, and members of their families and guests, can partake together of food and drink, they have formed a 'social club' in the everyday use of language, and in what we think must have been the sense of Congress in imposing this luxury excise tax. Eating is a universal human necessity. But eating in a select company in such agreeable environment as the Turks Head Club is a luxury. * * *"

Contrasted with these views are the holdings of the same and other courts prior to the 1942 *Duquesne* decision and cases from the Court of Claims both before

and after that decision. See *Century Club* v. *United States, supra.*

The Court of Claims rejected the *Duquesne* doctrine in *Merchants Club* v. *United States, supra,* stating that eating cannot be classed as a social activity, nor as a business activity. *Uptown Club of Manhattan* v. *United States,* Ct. Cl., 83 F. Supp. 823. More recently, that court cited the *Turks Head Club* case, *supra,* with approval although it has not overruled the *Merchants Club* case, *supra, Arkwright Club of City of New York, Inc.* v. *United States,* Ct. Cl., 117 F. Supp. 411. It has been able to distinguish the case where additional social features are present, *Railroad-Machinery Club of New York, Inc.* v. *United States,* Ct. Cl., 95 F. Supp. 822, and has refused application of the *Merchants* doctrine to a club composed of men in a variety of businesses, *Uptown Club of Manhattan* v. *United States, supra.*

Thus it appears that under recent cases from the Court of Claims, regardless of distinctions which might be drawn concerning greater or lesser amounts of entertainment provided and drinking done, that court would not find the predominant business purpose which would avoid the conclusion that a club organized to serve luncheons to businessmen with diversified business interests is a social club.

Appellant points out, however, that it need not prove that the motivation for the formation of the club was business, but that the government must show that its continued existence is due to its social activities, citing the language of *Tidwell* v. *Anderson, supra,* at page 587:

> "It should be noticed that the statute does not tax clubs generally. Only social, sporting, and athletic clubs are taxed. The issue is not one of

exemption from a tax but rather one of the scope of the statute. * * * "

The courts have long struggled to draft a definition of *social* serving the legislative intent in enacting the statute, see *Army & Navy Club of America* v. *United States*, Ct. Cl., 53 F. 2d 277; *Duquesne Club* v *Bell*, *supra*; Judge Hand's dissent in *Tidwell* v. *Anderson*, *supra*, without coming to a satisfactory conclusion because by dictionary definition the word is concerned with all human interrelationships. For this reason, then, the somewhat negative approach of the regulations have served to draw the line between a social club and one of another purpose. The congregation of people together into an association creates a social club unless their aggregation is shown to be for a definite mass purpose other than the desire of human beings to seek companionship. Even under the line of cases from the Court of Claims, cited supports no conclusion of any purpose and we are left merely with a group of people in a social organization unless we accept the conclusion of the *Rockefeller Center Luncheon Club* case, *supra*, that the individual business motivations of members would classify the club as a business club. This has been rejected by the majority of recent cases.

> "It would seem to be more consistent with the purpose of this legislation to say that an organization is a social club if its activities are largely social, even though the actuating motive of the members in joining was to secure business contacts, than to call such an organization a business club because its members are engaged in business, or they joined the club to secure, through its social activities, business contacts". *Fleming* v. *Reineke*, 7 Cir., 52 F. 2d 149.

The judgment of the trial court is affirmed.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the second day of May, one thousand nine hundred and sixty.

Present:

HON. CHARLES E. CLARK,
HON. STERRY R. WATERMAN,
HON. DAVID T. LEWIS,
Circuit Judges.

DOWNTOWN ASSOCIATION IN THE CITY OF NEW YORK,
Plaintiff-Appellant.

v.

UNITED STATES OF AMERICA,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
CLERK

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
FILED, MAY 2, 1960
A. DANIEL FUSARO, CLERK